1-1-1982

Chapter 11: Torts

Peter A. Donovan

Follow this and additional works at: http://lawdigitalcommons.bc.edu/asml

Part of the Civil Law Commons

Recommended Citation
CHAPTER 11

Torts

PETER A. DONOVAN*

§ 11.1. Liability for Sale of Alcoholic Beverages. Two cases during the Survey year further considered the liability of a seller of alcoholic beverages for injuries caused by a patron who is either intoxicated or a minor. In Cimino v. Milford Keg, Inc., 1 a tavern keeper sold alcoholic beverages to an intoxicated patron who subsequently caused the death of the plaintiff's son while operating a motor vehicle. Michnik-Zilberman v. Gordon Liquors, Inc., 2 reviewed similar issues in the context of a package store's liability where it sold a six-pack of beer to a minor. Both decisions follow the recent trend holding that the sale of alcoholic beverages to an intoxicated individual or to a minor may make the seller liable to a third person injured in a later automobile collision with the intoxicated or minor patron.

General Laws, chapter 138, section 69 forbids the sale of alcoholic beverages to intoxicated persons. 3 General Laws, chapter 138, section 34 similarly forbids such sales to minors. 4 As previously interpreted in Adamian v. Three Sons, Inc., 5 section 69 and section 34 impose a duty on tavern keepers to refuse to sell alcoholic beverages to persons they know, or reasonably should know, are intoxicated or minors. 6 Both provisions were enacted with the purpose of protecting not only the drinker himself, but members of the general public as well. 7 This is particularly relevant in

* PETER A. DONOVAN is a Professor of Law at Boston College Law School. The author greatly and respectfully acknowledges the research and writing assistance provided by Amy Warner in the preparation of this chapter.

3 G.L. c. 138, § 69, as amended by Acts of 1973, c. 287, provides in part: "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter ... to an intoxicated person. . . ."
4 G.L. c. 138, § 34, as amended by Acts of 1962, c. 354, provides in part: "... whoever makes a sale or delivery of [alcoholic] beverages . . . to any person under twenty one years of age . . . shall be punished. . . ."
6 Violation of G.L. c. 138, §§ 69 and 34 is evidence of negligence. The plaintiff must still prove (1) that the defendant breached a duty owed to the plaintiff; and (2) that this breach was the proximate cause of the plaintiff's injuries. Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968).
light of modern reality that travel by car to and from taverns is commonplace and accidents resulting from drunk driving are frequent.\(^8\)

*Cimino* resolves the important issue whether the liquor seller will be held to have knowledge that a particular patron was using an automobile. Prior to *Cimino*, there was some doubt how this issue would be decided.\(^9\)

In dealing with the sufficiency of a complaint, the Court in *Adamian*\(^10\) warned that: "Henceforth in this Commonwealth waste of human life due to drunken driving on the highways will not be left outside the scope of the foreseeable risk created by the sale of liquor to an already intoxicated individual."\(^11\) The Court found that the liquor seller involved in *Adamian* knew, or should have known, that the inebriated customer had arrived at the restaurant by automobile and, upon leaving, would drive home. On the same day, however the Court sustained a directed verdict for a defendant seller in *Diamond v. Sacilotto*,\(^12\) a case involving the sale of alcohol to minors who admittedly "felt the alcohol." Evidence that there was a town owned parking lot which patrons of the barroom could use was held insufficient in *Diamond* to show what the barroom owner knew or should have known that the patron was using an automobile.\(^13\)

*Cimino* expressly rejects *Diamond* to the extent that *Diamond* 'implies a necessity that a plaintiff must prove that the defendant knew or should have known that a particular intoxicated patron would use a motor vehicle. . . .'\(^14\) Such a requirement, the *Cimino* Court said, "flies in the face of the realities of modern life."\(^15\) Under *Cimino*, the plaintiff is aided by important inferences: "A jury may infer that a tavern keeper of ordinary caution recognizes that an intoxicated patron may drive an automobile, thus creating a risk of injury to highway travelers, and that such a person's response to the recognition ought to be to refrain from serving liquor to that patron."\(^16\)

Despite the *Cimino* inferences, the plaintiff still has to establish a causal connection between the sale and the accident. The Court explained the "jury may also infer that service of liquor to an intoxicated patron is the proximate cause of injuries sustained by a traveler who suffers direct injury by reason of a vehicle being operated by the patron in a manner that


\(^10\) See supra note 5 and accompanying text.


\(^13\) Id. at 502, 233 N.E.2d at 21.

\(^14\) 385 Mass. at 330, 431 N.E.2d at 926.

\(^15\) Id.

\(^16\) 385 Mass. at 331, 431 N.E.2d at 926. The Court also noted that although he may do so, it is unnecessary for the plaintiff to prove that the defendant solicited the motoring public, or that many of the patrons were drivers. Id.
§ 11.1  

TORTS  

is affected by his intoxication."  

17 The failure to establish this causal connection between the illegal sale and the resultant accident served as the basis for a directed verdict in favor of a liquor seller in *Wiska v. St. Stanislaus Social Club, Inc.* 18 despite the sale of liquor to a minor in violation of section 34. The only evidence in the *Wiska* record was that the minor was driving "normally" or "driving all right" at the time of the accident. 19 According to the Appeals Court in *Wiska*, it was "essential" to plaintiff's recovery that "it . . . be shown that the minor's negligent motor vehicle operation was due to the influence of alcohol affecting his ability to drive." 20

In *Michnik-Zilberman*, the Appeals Court held that there is "no distinction between tavern keepers and retail sellers of alcoholic beverages which would require the court to take the question of foreseeability from the jury when the forbidden sale is by a retail seller." 21 The significance of this equation can be appreciated when one considered the fact that the package store has no control over the buyer's consumption as does the tavern keeper. The court reasoned: "In claiming that a distinction exists by reason of the fact that a retail seller, unlike a tavern keeper, has no control over the consumption of the liquor, [the defendant] forgets that it is the sale rather than the consumption which may be found to constitute the negligent act." 22 Thus, the package store owner's sale of alcoholic beverages to a patron who he knows, or reasonably should know, is either intoxicated or a minor can be found by a jury to be the proximate cause of injuries to a third person injured by a vehicle subsequently operated improperly by the patron due to his intoxication.

*Michnik-Zilberman* is also the first Massachusetts case to hold that a sale to a *sober* minor can be found the proximate cause of a later accident. In other words, a seller of alcoholic beverages could be liable for injuries caused by a minor patron regardless of whether the minor was sober or inebriated at the time he made the purchase. Liability under the *Cimino* inferences is predicated upon a sale of alcoholic beverages to an already intoxicated person, a factor absent in *Michnik-Zilberman*. Despite the sobriety of the minor at the time of purchase in *Michnik-Zilberman*, the appeals Court "refused to conclude that in the face of public concern over the fact minors drink while driving, a jury may not infer that a retail seller of ordinary caution recognizes that a minor may consume the forbidden

---

17 Id. This position was reiterated in a footnote where the court specified eight specific requirements for recovery. *Id.* at 331 n.9, 431 N.E.2d at 926 n.9.


19 *Id.* at 816, 390 N.E.2d at 1136.

20 *Id.* at 817, 390 N.E.2d at 1136.


22 *Id.* at 539, 440 N.E.2d at 1301.
alcohol and drive before reaching some zone of adult supervision."

Michnik-Zilberman seems to suggest that the retail seller of alcoholic beverages who sells to a sober person he knows or should know is a minor becomes an insurer covering harm subsequently caused by that minor.  

§ 11.2 Medical Malpractice Tribunal — Admissibility of Tribunal’s Decision. During the Survey year the Supreme Judicial Court addressed several issues relating to the tribunal process established by General Laws, chapter 231, section 60B for medical malpractice actions. The first paragraph of section 60B provides that the medical malpractice plaintiff, as a condition of suit, “shall present an offer of proof” before a medical malpractice tribunal which “shall determine” whether “the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff’s case is merely an unfortunate medical result”. If the tribunal “determines” that the offer of proof is satisfactory, the plaintiff is permitted to proceed with his lawsuit without posting the bond required of plaintiffs whose offers are “determined” to be inadequate. Paragraph five of the statute provides, inter alia, that “[t]he tribunal may upon the application of either party or on its own decision ... appoint an ... expert to conduct any necessary professional or expert examination of the claimant or relevant evidentiary matter and to report or to testify as a witness thereto ... The testimony of said witness and the decision of the tribunal shall be admissible as evidence at a trial.”

The Supreme Judicial Court had to determine the relationship of these provisions for the first time in Beeler v. Downey. The trial court had
excluded from evidence the tribunal’s “determination” that the plaintiff’s offer of proof was sufficient to raise a question of liability appropriate for judicial inquiry. The trial judge believed that section 60B was unconstitutional insofar as it required the admission into evidence of such “determination.” The decision was affirmed by the Supreme Judicial Court on different grounds.

In Beeler, the trial judge construed section 60B to require that the “determination” of the tribunal as to the sufficiency of the plaintiff’s offer of proof must be admitted at trial. Based on this interpretation, the trial judge held that section 60B violated the due process clause by requiring the admission of a decision which was based on evidence not subject to cross examination. Following the principle that a reviewing court “must presume a statute’s validity, and make all rational inferences in favor of it,” the Supreme Judicial Court interpreted section 60B in a manner which avoided ruling on its constitutionality. The Court construed the word “decision,” used for the first time in the fifth paragraph of the statute, to refer, not to the tribunal’s “determination” as to the sufficiency of the plaintiff’s offer of proof, but to the decision of the tribunal to appoint an impartial expert witness. The Court found support for this conclusion in “the critical last sentence of the paragraph which refers both to the testimony of the expert appointed by the tribunal and the decision of the panel to appoint him.” Under this construction, the statute remained constitutional throughout. Under Beeler, “[o]nly the decision of the tribunal to call an expert, and the testimony of the expert before the tribunal, would be admissible, and both parties would have had an opportunity to question and cross-examine the expert before the tribunal.”

---

6 Id. at 610, 442 N.E. 2d at 20.
7 Id. at 610, 442 N.E.2d at 20.
8 The trial judge concluded that the words “determination” and “decision,” found in the first and fifth paragraphs of section 60B, refer to the “finding” that no bond was required of plaintiff because the offer of proof was “sufficient to raise a legitimate question of liability appropriate for judicial inquiry.” 387 Mass. at 612, 442 N.E.2d at 21.
10 387 Mass. at 615-16, 442 N.E.2d at 22-23 (quoting Paro v. Longwood Hospital, 363 Mass. 645, 650, 369, N.E.2d 985, 990 (1977)).
11 387 Mass. at 618, 442 N.E.2d at 23. The Court determined that the decision of the tribunal to appoint the expert was relevant because the jury would be able to evaluate his testimony and presumably his report “with the knowledge that he has not been retained by either party.”
12 Id.
13 Id.
§ 11.3. Medical Malpractice Tribunal — Scope of Coverage. Under General Laws, chapter 231, section 60B, the medical malpractice tribunal has jurisdiction over "[e]very action for malpractice, error or mistake." In Lubanes v. George, the Supreme Judicial Court held that a claim against a physician alleging that he performed a surgical procedure on the plaintiff without the plaintiff's consent, or contrary to plaintiff's express instructions, is subject to section 60B and the tribunal procedure even though the claim sounds in battery. The Court followed its interpretation in Little v. Rosenthal that "all treatment-related claims were meant to be referred to a malpractice tribunal." Previously, the Court applied this same interpretation to actions for breach of contract to produce a particular medical result. In concluding that unauthorized surgery is covered by the tribunal process, the Court in Lubanes reasoned that it "is as much a form of malpractice as is the failure to produce a promised medical result." As such, unauthorized surgery fell within the Court's earlier pronouncement that "the policy embodied in section 60B of discouraging frivolous claims against physicians would be furthered by including such actions within its scope."

The plaintiff's burden in making a suitable offer of proof in an unauthorized surgery case seems easily met. By affidavit and unspecified other documents, the plaintiff in Lubanes claimed he consented only to the removal of his toenail. The defendant however, performed an additional surgical procedure, a subungual exostectomy, on the point of the plaintiff's toe. Although the consent form listed "Halix nail removal" and "subungual exostosis" as the procedures to be performed, the plaintiff claimed that the latter procedure was not on the consent form when he signed it. The Court willingly accepted the plaintiff's affidavit.

§ 11.3. 1 G.L. c. 231, § 60B provides in part: "Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal . . . at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff’s case is merely an unfortunate medical result. . . . Substantial evidence shall mean such evidence as a reasonable person might accept as adequate to support a conclusion. . . . If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars. . . ."

3 Id. at 325, 435 N.E.2d at 1034.
5 Id. at 576, 382 N.E.2d at 1040.
7 386 Mass. at 324, 435 N.E.2d at 1034.
8 Id. at 324, 435 N.E. 2d at 1034.
9 Id. at 323, N.E.2d at 1035.
10 Id. at 326, N.E.2d at 1035.
§ 11.4. Medical Malpractice — Informed Consent In the important decision of *Harnish v. Children's Hospital Medical Center*, the Supreme Judicial Court addressed the issue of what medical information a physician must disclose to his patient under the informed consent doctrine. The purpose of this doctrine is to enable a patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure. Consent given by a patient pursuant to inadequate disclosure of medical information will not insulate medical personnel from a subsequent claim of unauthorized treatment. The *Harnish* Court clearly defined the scope of disclosure required in Massachusetts under the informed consent doctrine.

According to the offer of proof in *Harnish*, the plaintiff underwent an operation to remove a tumor in her neck. During the procedure, her hypoglossal nerve was severed, allegedly resulting in a permanent and almost total loss of tongue function. The plaintiff claimed the physicians and the hospital were negligent in failing to inform her before surgery of the risk of loss of tongue function. She alleged that the purpose of the operation was cosmetic, that the loss of tongue function was a material and foreseeable risk of the operation, and that had she been informed of this risk, she would not have consented to the operation. The medical malpractice tribunal concluded that the offer of proof was insufficient. A trial judge of the superior court then dismissed the plaintiff’s action brought against the doctors who performed the operation and the hospital where it was performed for failure to post a bond. In reversing as to the doctors who counseled prior to her operation, the Supreme Judicial Court found the offer of proof sufficient to vitiate her consent to the operation.

The Court first noted that the fundamental premise underlying all medical treatment is that “it is the prerogative of the patient, not the physician, to determine . . . the direction in which . . . his interest lie.” The doctrine of informed consent has developed to protect the right of a patient to make his own intelligent decision whether to undergo a medical or surgical procedure. The “knowing exercise of this right requires knowledge of the
available options and risks attendant on each."  

Consequently, the Court held "that a physician's failure to divulge in a reasonable manner to a competent adult patient sufficient information to enable the patient to make an informed judgment whether to give or withhold consent to a medical or surgical procedure constitutes professional misconduct and comes within the ambit of [chapter 231, section 60B of the General Laws]."  

In defining the scope of the physician's duty to disclose medical information, the Harnish Court recognized both that there are limits to what society or an individual can reasonably expect of a physician, and that there may be almost no limit to the possible risks of a proposed treatment. In order to avoid placing an undue burden upon the physician, the Court adopted a rule that balanced the physician's predicament with the patient's right to know. It declared that "a physician owes to his patient the duty to disclose in a reasonable manner all significant medical information that the physician possesses or reasonably should possess that is material to an intelligent decision by the patient whether to undergo a proposed procedure."  

Information which a physician reasonably should possess was further defined as "that information possessed by the average qualified physician or, in the case of a specialty, by the average qualified physician practicing that specialty." Equally important is the Court's further statement that the determination of what medical information is material to an intelligent decision by the patient is one that lay persons are qualified to make without the aid of an expert. What the physician should know however, can ordinarily be proved only by expert testimony.

The duty to disclose is not absolute. Situations may arise where the physician will be privileged to withhold information in the patient's best interest. This privilege to withhold information must be "carefully circumscribed," the Court warned, in order to keep it from "dévour[ing] the disclosure rule itself." Moreover, "[t]he privilege does not accept the paternalistic notion that the physician may remain silent simply because
divulgence might prompt the patient to forego therapy the physician feels the patient really needs." 18

As a prerequisite to recovery, the patient must of course show that the physician's failure to disclose material medical information is a legal cause of the injury sustained. On the question of causation, the Court noted that whether the alleged undisclosed risk materialized is a medical question appropriate to the malpractice tribunal's inquiry. 19 Whether a reasonable person in similar circumstances, if given the proper information, would have undergone the medical procedure anyway is not medical question, however, and is not, therefore, appropriate to the tribunal's inquiry. 20

Finally, the *Harnish* Court discussed which persons could be held liable for the failure to obtain the patient's informed consent. The Court found that the hospital could not be held vicariously liable for the alleged negligence of the surgeons absent proof that the surgeons were affiliated with the hospital and that the hospital had power of control over their professional conduct. 21 Also, a physician who merely assisted in the operation could not be held liable for failing to obtain the plaintiff's informed consent. 22 The plaintiff's offer of proof in *Harnish* was held sufficient to raise a question appropriate for judicial inquiry not only with respect to the physician in charge of the operation, but also with regard to another physician who assisted at the operation and who had discussed the potential consequences of the surgery with the plaintiff but had failed to disclose the risk of loss of tongue function. 23

§ 11.5. Wrongful Death — Causation. In *Miles v. Edward O. Tabor, M.D., Inc.*, 1 the defendant doctor's negligence at the birth of the plaintiff's son allegedly resulted in the boy's death about two month's later. 2 Judgment was entered on a verdict for the plaintiff for the wrongful death of the boy. 3 On appeal, the defendant admitted the negligence but argued there was insufficient evidence of causation. Two causes of death were listed on the death certificate: aspiration pneumonia, and a congenital malformation of the gastrointestinal ("G.I.") tract. 4 Defendant claimed

---

18 *Id.* at 157, 439 N.E.2d at 244.
19 *Id.* at 158, 439 N.E.2d at 244.
20 *Id.*
21 *Id.* at 159, 439 N.E.2d at 245.
22 *Id.*
23 *Id.* at 158-59, 439 N.E.2d at 244-45.

§ 11.5 1 387 Mass. 783, 443 N.E.2d 1302 (1982). *Miles* is also discussed in section 6 of this chapter.

---

2 *Id.* at 784-85, 443 N.E.2d at 1303.
3 *Id.* at 784, 443 N.E.2d at 1303.
4 *Id.* at 786, 443 N.E.2d at 1304.
that even if there were evidence that his negligence was causally related to the aspiration pneumonia, there was no such evidence as to the other cause of death. Therefore, the defendant reasoned there was no way for the jury to find that aspiration pneumonia rather than the G.I. tract malformation was the cause of death.

The Supreme Judicial Court found defendant's argument flawed because a death certificate is not conclusive, but only "prima facie evidence of the facts recorded." In this case, there was ample evidence contradicting the death certificate. This evidence included the testimony of a physician who examined the baby shortly after its birth. In fact, the birth certificate completed by the defendant himself indicated that the plaintiff's son did not have any congenital malformations. This conflict between the death certificate and the birth certificate by itself raised a factual issue, and the Court concluded that "the jury could, therefore, disregard the statement on the death certificate that the malformation of the G.I. tract was a cause of death." Since the death certificate was inconclusive on the issue of causation, the Court found there was sufficient evidence before the jury from which it could find that the cause of death was aspiration pneumonia and that defendant's inadequate resuscitative techniques in the delivery room were causally related to the death of plaintiffs' son. Relying upon its earlier pronouncement in Woronka v. Sewall, the Court stated: "the plaintiff was not required to show the exact cause of (the) injuries or to exclude all possibility that they resulted without fault on the part of the defendant. It was enough if (he) showed that the harm which befell (his son) was more likely due to negligence of the defendant than to some other cause for which he was not liable."


---

5 Id.
6 Id.
8 387 Mass. at 787, 443 N.E.2d at 1304.
9 Id.
10 Id. Once evidence is introduced contradicting the prima facie evidence, the prima facie evidence need be given "only the weight that . . . [it] deserve[s] in the estimation of the jury." Id. at 786, 443 N.E.2d at 1304 (citing Cook v. Farm Serv. Stores, Inc., 301 Mass. 564, 569, 17 N.E.2d 890, 893 (1938)).
11 Id. at 787, 443 N.E.2d at 1304-05.

§ 11.6. 387 Mass. 783, 443 N.E.2d 1302 (1982). Miles is also discussed in section 5 of this chapter.
distress upon the plaintiff which she allegedly suffered as a result of witnessing a doctor's negligent resuscitation of her newborn son in the delivery room. The mother sought to establish her claim through the opinion testimony of a psychiatrist that her depression originated with her observation of the doctor’s actions in the delivery room. The psychiatrist focused on the mother’s grief following her son’s death two months after the defendant’s negligent conduct, however, and did not dispute the fact that the mother “experienced no symptoms of emotional distress until after [her son’s] death.” The Supreme Judicial Court affirmed a judgment for the defendant notwithstanding the verdict because there was insufficient evidence to show that the mother experienced her emotional distress at the time of the doctor’s negligence in the delivery room.

Mrs. Miles predicated her claim of emotional distress on Dziokonski v. Babineau, a 1978 decision in which the Court abandoned the requirement of physical impact as a component of the tort of negligent infliction of emotional distress. The Dziokonski Court held that a parent may recover damages for “substantial physical harm sustained as a result of severe mental distress over some peril or harm to his minor child caused by the defendant’s negligence. . . .” The Dziokonski mother actually died from shock when she saw her child in the street immediately after a motor vehicle accident. Dziokonski left open the question whether the child’s father could recover for his emotional distress where there was a time lapse between that accident and the father’s knowledge of the death of his wife and the injuries to his son. This question was partially answered in Ferriter v. Daniel O’Connell & Sons, Inc., where the Court held that severe mental distress is a reasonably foreseeable consequence of the defendant’s negligence if such anguish “follows closely on the heels of the accident.” It appears that Miles has answered the question at the other extreme where the distress is long delayed.

In Miles, all the evidence of emotional distress experienced by the mother related to the period after her son’s death rather than to the time of the defendant’s negligence in the delivery room two months earlier. Thus, there was insufficient evidence that the mother suffered any emotional distress at the time of her son’s birth which was distinct from her claim for

---

2 Id. at 784-85, 443 N.E.2d at 1303.
3 Id. at 789, 443 N.E.2d at 1305-06.
4 Id. at 789, 443 N.E.2d at 1305.
5 Id. at 784, 789, 443 N.E.2d at 1303, 1305-06.
7 Id. at 556, 380 N.E.2d at 1296.
8 Id. at 568, 380 N.E.2d at 1302.
10 Id. at 518, 413 N.E.2d at 697.
his wrongful death. The Court distinguished *Cimino v. Milford Keg, Inc.*, in which it held that a claim for emotional distress of a parent could be distinct from the action for the wrongful death of a child. In *Cimino* a father suffered both physical injuries and emotional distress in the same accident that killed his son. The emotional distress occurred at the time of the defendant’s negligence. “There was no delayed response to the child’s death.” The court also noted that the mother in *Miles*, unlike the father in *Cimino*, “suffered no direct injury from the defendant’s negligent treatment” of her son.

In another case, *Payton v. Abbott Labs*, the Court finally addressed the specific issue of whether emotional injury unaccompanied by physical injury should be compensable. This issue was left unresolved by the *Dziokonski* Court, which indeed had emphasized the requirement of “substantial physical harm.” The questions in *Payton* were presented to the Supreme Judicial Court on certification from the United States District Court for the District of Massachusetts in the context of a motion to dismiss. These questions were based upon the plaintiffs’ allegations that the defendants were negligent in marketing the drug diethylstilbestrol (“DES”) as a miscarriage preventative without adequate testing and appropriate warning.

The certified question concerning recovery for emotional distress read as follows: “Does Massachusetts recognize a right of action for emotional distress and anxiety caused by the negligence of a defendant, in the absence of any evidence of physical harm, where such emotional stress and anxiety are the result of an increased statistical likelihood [that] the plaintiff will suffer serious disease in the future?” The question assumed both that defendants were negligent, and that their negligence caused the plaintiffs’ emotional distress. The Supreme Judicial Court returned a negative answer to this question.

The Court first noted that jurisdictions allowing recovery for the negligent infliction of emotional distress without proof of physical harm are clearly in the minority. Three policy reasons were given for adhering to

---

11 385 Mass. 323, 431 N.E.2d 920 (1982). *Cimino* is discussed in section 1 of this chapter.
12 387 Mass. at 789 n.8, 443 N.E.2d at 1306 n.8.
13 *Id.*
14 386 Mass. 540, 437 N.E.2d 171 (1982). *Payton* is also discussed in section 7 of this chapter.
16 386 Mass. at 541-42, 437 N.E.2d at 173.
17 This was a class action by plaintiffs who alleged that they faced an increased risk of serious disease as a result of exposure in utero to DES, but who had not as of yet developed such serious disease. *Id.* at 540 n.1, 437 N.E.2d at 171 n.1.
18 *Id.* at 544, 437 N.E.2d at 174.
19 *Id.*
20 *Id.* at 546, 437 N.E.2d at 175.
the physical harm requirement: (1) emotional disturbance which is not so serious as to have physical consequences is likely to be "so temporary, so evanescent and so relatively harmless" that the task of compensating for it would unduly burden defendants and the court; (2) in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance can be too easily feigned or imagined; and (3) where the defendant's conduct has been merely negligent, without intent to harm, his fault is not so great that he should be required to compensate the plaintiff for a purely mental disturbance.\textsuperscript{21} The Court then reviewed the common law history of the attempts to formulate a rule which would allow recovery for plaintiffs with clearly recognizable serious emotional injuries, while weeding out trivial or feigned claims. Massachusetts first followed the impact rule, which limited recovery for emotional distress to cases where a defendant's negligence caused a physical impact of some kind to plaintiff's person.\textsuperscript{22} The meaning of "impact" was eventually stretched to allow recovery in other cases and, in 1971, the Court essentially adopted Section 46 of the Restatement (Second) of Torts,\textsuperscript{23} and allowed recovery for the intentional infliction of severe emotional distress "with bodily harm resulting from such distress."\textsuperscript{24} Five years later, the Court acknowledged recovery for the intentional infliction of emotional distress without resulting bodily injury.\textsuperscript{25} Thus, in lieu of impact, the element of the defendant's intention, or of the recklessness of his conduct, became the additional requirement necessary for satisfactory proof.

The parasitic recovery cases, which require physical injury to accompany the alleged emotional distress, represent an attempt to find an element of satisfactory proof.\textsuperscript{26} In these cases, that element is defined as a contemporaneously inflicted physical injury.\textsuperscript{27} More recently, plaintiffs have met the requirement of satisfactory proof absent impact if they were within the "zone of danger" created by defendant's negligence, even though they did not suffer physical injuries.\textsuperscript{28} In 1978, the Supreme Judicial Court considered the need for satisfactory proof in these cases, and held that recovery by a bystander plaintiff would be allowed, regardless of whether the plaintiff was within the "zone of danger," if there was both proof of "substantial physical injury and proof that the injury was caused by the defendant's negligence."\textsuperscript{29}

\textsuperscript{21} Id. at 553, 437 N.E.2d at 180.
\textsuperscript{23} RESTATEMENT (SECOND) OF TORTS § 46 (1965). Section 46 acknowledges the existence of the tort of "outrageous conduct causing severe emotional distress."
\textsuperscript{26} See 386 Mass. at 548, 437 N.E.2d at 176.
\textsuperscript{27} See id.
\textsuperscript{28} See id. at 554, 437 N.E.2d at 177.
After reviewing the various approaches used in negligent infliction of emotional distress cases, including its own prior pronouncements on this issue, the Payton Court concluded that for negligently inflicted emotional distress, a plaintiff must allege and prove she suffered physical harm that was either the cause, or was caused by, the alleged emotional distress.\textsuperscript{30} Furthermore, the Court stressed that to be compensable, the emotional distress allegedly suffered by the plaintiff must be reasonably foreseeable and no more than the which "a reasonable person, normally constituted, would have experienced under [similar] circumstances."\textsuperscript{31} Thus, following Payton, in order to recover for negligently inflicted emotional distress, a plaintiff must prove: (1) negligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case.

\textbf{§ 11.7. DES Issues — Wrongful Life — Injury In Utero.} In Payton v. Abbott Labs\textsuperscript{1} the United States District Court for the District of Massachusetts certified several questions to the Supreme Judicial Court to determine whether Massachusetts law would allow tort recovery by women whose mothers ingested the drug diethylstilbestrol ("DES") as a preventative of miscarriages. The Court's response to the second of these questions\textsuperscript{2} was that there can be no tort recovery by a women who "would probably not have been born except for the mother's ingestion of DES."\textsuperscript{3} In arriving at this conclusion, the Court found neither the wrongful life nor the Good Samaritan analogies compelling on the facts before it. With respect to the former theory, the Court noted that other jurisdictions have "almost invariably denied recovery" because "life is more precious than non-life."\textsuperscript{4} Also, the Court observed, the judiciary is incapable of assessing "the relative monetary values of existence and nonexistence."\textsuperscript{5}

\textsuperscript{30} 386 Mass. at 556, 437 N.E.2d at 180.
\textsuperscript{31} Id. at 557, 437 N.E.2d at 180. The Payton Court felt that emotional distress is reasonably foreseeable "when there is a causal relationship between the physical injuries suffered and the emotional distress alleged." Id. at 556, 437 N.E.2d at 180.
\textsuperscript{1} Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982). Payton is also discussed in section 6 of this chapter.
\textsuperscript{2} The Court's response to the first certified question is discussed in section 6 of this chapter.
\textsuperscript{3} 386 Mass. at 557, 437 N.E.2d at 181. This defense may not be as significant in fact as it is in theory because the burden of proof in this issue is upon the drug manufacturer and medical records on testimony from a prior generation may not be readily available.
\textsuperscript{4} Id. at 558, 437 N.E.2d at 181 (quoting \textit{Berman v. Allan}, 80 N.J. 421, 429, 404 A.2d 8, 13 (1979)).
\textsuperscript{5} 386 Mass. at 558, 437 N.E.2d at 181.
The Court found that the Good Samaritan decisions were not on point because the complainants in the case sub judice were not placed in a worse position, but in fact were the very persons rescued. Moreover, the Court stated "if the only alternative to the defendants' 'rescue' is that the plaintiff would not have been born, we cannot perceive how the plaintiffs would have been better off if the defendants had not acted."

While the "wrongful life" cases were not directly on point in Payton, the Court did find them persuasive in some respects. Relying on their rationale, the Court held that, "if the trier of fact finds that a preponderance of the credible evidence supports the conclusion that a particular plaintiff would not have been born except for her mother's ingestion of DES, the plaintiff is barred from recovery." This ruling places the burden of proof on the defendants who are required to show that: "(1) the mothers of the plaintiffs would have suffered, in each instance, a miscarriage absent medical intervention; (2) no other means, method or substance was available to prevent a miscarriage; and (3) DES did, in fact, prevent the miscarriage and cause the plaintiffs to be born." "The provider of the probable means of a plaintiff's very existence should not be liable for unavoidable collateral consequences of the use of that means."

The Court answered another certified question affirmatively by recognizing a right of action for injury to a plaintiff in utero resulting from the ingestion of a drug by her mother. The court made three assumptions in answering the questions: "(a) the plaintiffs have suffered injuries which are legally compensable if wrongfully inflicted; (b) the defendants' conduct was negligent; and (c) the defendants' conduct was the cause of the plaintiffs injuries." No reason was found to distinguish the present case, in which the plaintiff's mother ingested the drug, from the case in which plaintiffs themselves ingest a drug and directly suffer injury as a result.

§ 11.8. Malicious Prosecution — Abuse of Process. Two cases during the Survey year discussed the nature of an attorney's liability for malicious prosecution and for abuse of process. In the first of these cases, Beecy v. Pucciarelli, the plaintiffs brought an action against an attorney for malicious prosecution and for abuse of process based on the attorney's

---

6 Id. at 559, 437 N.E.2d at 182.
7 Id.
8 Id. at 559, 437 N.E.2d at 182.
9 Id. at 560, 437 N.E.2d at 182.
10 Id.
11 Id.
12 Id. at 562, 437 N.E.2d at 184.
13 Id.

erroneous institution of a collection action on behalf of his client, a department store, against two of the store's charge account customers. The husband and wife plaintiffs unfortunately had the same name as a delinquent charge account customer. The Supreme Judicial Court approved a Rule 12(b)(6) dismissal for failure to state a claim upon which relief could be granted.

In the 1835 decision of *Bicknell v. Dorion* the Supreme Judicial Court established the limitations on malicious prosecution actions against attorneys, concluding that such actions could not be brought "unless the attorney commenced the suit without the authority of the named plaintiff or unless the attorney and the named plaintiff had conspired or otherwise knowingly agreed to commence a groundless lawsuit." Although the Court in *Beecy* noted that "there are compelling reasons for abolishing" the *Bicknell* immunity limitations, it did not feel compelled to do so because the plaintiffs failed to allege the requisite elements to establish their cause of action. The tort of malicious prosecution requires the institution or continuation of a proceeding, with malice and without probable cause, as well as the termination of the proceeding in favor of the accused. The plaintiffs failed to allege facts showing malice. In a proper case the existence of malice may be inferred from the lack of probable cause. The Court refused to do so in *Beecy* because the facts belied any malice on the part of the attorney. A person with a name identical to the plaintiffs did have a delinquent account with the defendant department store, and when the defendant attorney realized this mistake he promptly filed a notice of voluntary dismissal of the collection action and sent a letter of apology to the plaintiffs. Although the attorney failed to instruct the sheriff not to serve the summonses and complaints on the plaintiffs, his failure to do so was not maliciously intended.

In *Carroll v. Gillespie*, the other malicious prosecution and abuse of

---

2 *Id.* at 591-92, 441 N.E.2d at 1037.
3 *Id.* at 590-91, 441 N.E.2d at 1037.
4 33 Mass. (16 Pick.) 478 (1835).
5 *See* 387 Mass. at 593, 441 N.E.2d at 1038 (citing Bicknell v. Dorion, 33 Mass. (16 Pick.) 478, 490 (1835)).
6 *Id.*
7 Specifically, the plaintiffs in *Beecy* failed to show that the attorney (1) knew that there was no probable cause for the prosecution and (2) either personally acted with an improper motion or knew that his client was motivated by malice. 387 Mass. at 593, 441 N.E.2d at 1038-39. *See* Wills v. Noyes, 29 Mass. (12 Pick.) 324, 328, (1832); RESTATEMENT (SECOND) OF TORTS § 674 comment d (1977).
9 387 Mass. at 594-95, 441 N.E.2d at 1039.
10 *Id.* at 595, 441 N.E.2d at 1039.
process case decided during the Survey year, the Appeals Court upheld a jury verdict for the plaintiff where the defendant had the plaintiff arrested for forging an endorsement on a check. The facts made it clear that the defendant did not have probable cause to believe that it was the plaintiff who had endorsed the check. There was also evidence that the defendant caused the arrest in order to coerce the plaintiff into paying a debt.\textsuperscript{12}

On review, the court stressed the probable cause issue. Noting that probable cause is an objective standard, the court chose to follow the Restatement definition that "the defendant has probable cause only when a reasonable man in his position would believe, and the defendant does in fact believe, that he has sufficient information as to both the facts and the applicable law to justify him in initiating the criminal proceeding without further investigation or verification."\textsuperscript{13} The defendant was unable to measure up to this standard. When he went to the police and charged the plaintiff with forgery the defendant was clearly aware of the following facts: "the check was not endorsed when the defendant's company originally received it; that it had previously been returned by the bank for that reason; it was then redeposited by the dealership with a signature on the back; plaintiff had sworn in an affidavit that she did not sign the check; and her signature had, in fact, been forged."\textsuperscript{14} Also, the defendant admitted at trial he had no personal knowledge whether the plaintiff had signed the check.\textsuperscript{15} The court therefore concluded that the defendant recklessly made categorical statements to an officer accusing the plaintiff of forgery based on ambiguous and superficial information, and that those statements resulted in the plaintiff's arrest.\textsuperscript{16}

Both \textit{Beecy} and \textit{Carroll} also contained abuse of process counts. "To prevail on a cause of action for abuse of process 'it must appear that the process was used to accomplish some ulterior purpose for which it was not designed or intended, or which was not the legitimate purpose of the particular process employed.' "\textsuperscript{17} In \textit{Beecy} the claim failed because there was no allegation that the attorney or his department store client used the collection action process for any purpose other than debt collection.\textsuperscript{18}

\begin{itemize}
\item \textsuperscript{12} \textit{Id.} at 26, 436 N.E.2d at 439.
\item \textsuperscript{13} 14 Mass. App. Ct. at 129, 436 N.E.2d at 437 (quoting \textsc{Restatement (Second) of Torts} § 662 comment j (1977)).
\item \textsuperscript{14} 14 Mass. App. Ct. at 22, 436 N.E.2d at 437-38.
\item \textsuperscript{15} \textit{Id.} at 22, 436 N.E.2d at 437.
\item \textsuperscript{16} \textit{Id.} at 25-26, 436 N.E.2d at 438-39.
\item \textsuperscript{18} \textit{Id.} at 595-96, 441 N.E.2d at 1039-40.
\end{itemize}
commencing the litigation knows or reasonably should have known to be groundless [does not] constitute legal abuse of process without proof of ulterior purpose."¹⁹ In Carrol, however, the plaintiff was successful because there was sufficient evidence from which the jury could find that the defendant caused the plaintiff’s arrest because he wanted to collect a debt and thus sought to use the criminal process for a civil purpose.²⁰

§ 11.9. Torts Claims Act — Public Duty Doctrine. In Dinsky v. Framingham¹ the Supreme Judicial Court handed down a decision which may drastically circumscribe public liability for negligent performance of public functions despite the 1978 enactment of the Massachusetts Torts Claims Act.² In this case of first impression, the Court applied the public duty doctrine, which states that public employees are not liable for negligent performance of purely public duties.³

In Dinsky, the town’s department of health issued a building permit for the construction of a one family residence on the “condition that the lots shall be graded as to prevent low spots that will not drain and create a public nuisance.”⁴ The town later issued an occupancy permit despite the fact that the requirements expressed in the condition were not met.⁵ More than two years later, the property flooded to a depth exceeding one inch in the house.⁶ The garage, driveway and large portions of the lawn were also flooded.⁷ As a result large cracks developed in the walls of the foundation.⁸

The plaintiffs, who were residents of the affected property, sued the municipality for damages under the tort claims act.⁹ A directed verdict for the city was upheld on appeal.¹⁰ The Supreme Judicial Court concluded that the abrogation of the doctrine of governmental immunity by the act did not create any new theory of liability, but simply removed the defense of immunity in certain tort actions against the Commonwealth, municipalities and other governmental units.¹¹ The plaintiffs “were not entitled

¹⁹ Id. at 596, 441 N.E.2d at 1039-40.
² Gl. c. 258, §§ 1-13.
⁴ 386 Mass. at 802, 438 N.E.2d at 52.
⁵ Id.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ See id. at 802-03, 438 N.E.2d at 52.
¹⁰ Id. at 802, 438 N.E.2d at 51.
¹¹ Dinsky, 386 Mass. at 804, 438 N.E.2d at 54.
to recover against the town because the town did not violate a duty owed to them as individuals."12 The building codes were found to "confer no specific duties upon building commissioners or inspectors with regard to individual citizens and property owners.13

It is not at all clear that Dinsky is intended to adopt a broad public duty doctrine. The Court was careful in its opinion to cite only negligent inspection cases. It's failure to rely upon other types of public duty cases may indicate a recognition of the incompatibility of that doctrine with the Legislature's admonition to construe the tort claims act "liberally" in order to accomplish its intended purpose to substitute governmental liability for governmental immunity.14

12 Id.
13 Dinsky, 386 Mass. at 809, 438 N.E.2d at 55-56.
14 See Acts of 1978, c. 512, § 18; see also Glannon, supra note 3, at 160.